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In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF BIRMINGHAM, MICHIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the finding of the district court, affirmed by the court of appeals, that the City of Birmingham, Michigan, acted with racially discriminatory intent in blocking the development of low-income housing is clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50a-60a) is reported at 727 F.2d 560.[1] The district court's memorandum opinion and judgment (Pet. App. 1a-24a) are reported at 538 F. Supp. 819. Its supplemental findings of fact and conclusions of law (Pet. App. 26a-49a) are unreported. The district court's order amending its judgment (Pet. App. 60a) also is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1984, and the petition for a writ of certiorari was filed on May 4, 1984. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner omitted one page from the court of appeals' opinion in the appendix to the petition (App., *infra*, 1a-2a). The omitted page is reprinted as an appendix to this brief and follows Pet. App. 58a.

STATEMENT

1. The United States filed this action on May 7, 1980, alleging that petitioner ("the City" or "Birmingham") had, for racial reasons, engaged in conduct intended to prevent a private corporation (Baldwin House) from developing racially integrated, low-income housing, in violation of Sections 804(a) and 817 of the Civil Rights Act of 1968 (the Fair Housing Act), 42 U.S.C. 3604(a) and 3617 (Pet. App. 2a).

Trial on the issue of liability lasted from August 24, 1981, until October 1, 1981. On May 3, 1982, the district court rendered a detailed opinion holding that Birmingham had blocked Baldwin House's efforts because of its desire to exclude black people from the City, in violation of 42 U.S.C. 3604(a) and 3617 (Pet. App. 1a-20a). After two days of hearings on the question of remedy, the court, on May 27, 1982, entered an order enjoining the City from interfering further with the Baldwin House project and requiring it to cooperate with Baldwin House's efforts to develop housing (*id.* at 21a-24a). On June 9, 1982, the court filed supplemental findings of fact and conclusions of law (*id.* at 25a-49a).

The court of appeals affirmed the judgment of the district court, but, on the request of the United States and the City, modified the district court's injunction making it clear that the City is prohibited from interfering with Baldwin House's development of housing only if the interference is based on racial grounds (Pet. App. 50a-59a; App., *infra*, 1a-2a).

2. The facts, as summarized below, are taken primarily from the district court's opinion and supplemental opinion on liability (Pet. App. 1a-20a, 31a-49a), which were not disturbed by the court of appeals. Birmingham is a suburb of Detroit, Michigan. According to the 1980 census, .2% of Birmingham's 22,000 residents are black (*id.* at 31a). Aware of its acute need for senior-citizen housing, in the summer of

1975, the City accepted the proposal of the Baldwin House Corporation to purchase the Baldwin school site for construction of 156 units of publicly-assisted senior citizen housing. Because sale of the school site required voter approval, the City held a referendum in April 1976 at which the voters overwhelmingly approved the sale. The City subsequently entered into a contract with Baldwin House that allowed it one year to obtain financing. *Id.* at 2a-3a & n.2.

Baldwin House thereupon sought financing from the Michigan State Housing Development Authority (MSHDA) and was informed that MSHDA would require development of one unit of low-income family housing for every two units of senior citizen housing. After exchanges of proposals, Baldwin House, on September 1, 1977, finally submitted a proposal that MSHDA accepted for processing. On October 25, 1977, MSHDA approved an $83,000 development loan for the Baldwin House project. Pet. App. 3a-6a.

Opposition to the proposal arose shortly after the announcement that Baldwin House intended to include low-income family housing in its proposal to MSHDA. One City Commissioner, Robert Kelly, openly equated nonresidents of Birmingham with members of minority groups and opposed their movement into Birmingham. Pet. App. 6a-7a. A vocal group, led by Nancy Elby, began to appear at City Commission meetings and to demand submission of the Baldwin House proposal to an advisory referendum.[2] One City Commissioner felt constrained to

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[2]As a result of this pressure, the Commission adopted a series of amendments to the agreement to sell land to Baldwin House. Principal among these were provisions that the contract would terminate if MSHDA required Baldwin House to construct multi-unit family housing and that Baldwin House could not take any steps toward providing anything other than senior citizen housing. Pet. App. 8a.

warn Elby that her opposition could appear to be motivated by a desire to exclude black people from Birmingham. *Id.* at 7a-8a. Nevertheless, the City Commission eventually agreed to submit the proposal to an advisory referendum in April 1978, at the same time that three Commissioners who supported the proposal would stand for reelection (*id.* at 9a).

The Commission and referendum campaign bore racial overtones. One opposition candidate, for example, stated at a public meeting that the Baldwin House proposal would create an economic and social mix that was "biologically wrong." Pet. App. 9a. A campaign flyer stated that the Baldwin House proposal would bring in "non-residents" and noted that priority would be given to "16% minorities" (*ibid.*). Citizen opposition to Baldwin House, as communicated to the City Commissioners in correspondence and in private conversations, also revealed racial animus. Letters to City Commissioners opposed dwellings " 'being reserved for blacks when there was not a black child in the school system' " and any " 'requirement that the City artificially alter the population makeup of the community so as to provide a diverse population pool' " (*id.* at 10a). One Commissioner testified that a majority of the concerns expressed to him in private prior to the April referendum were to the effect that family housing would lead black people to come to the City and reduce property values (*id.* at 19a).

At the April 1978 referendum the proposal was rejected and the three Commissioners who had stood for reelection were all defeated by the opponents of Baldwin House. Shortly thereafter, the remaining three Commissioners who had supported Baldwin House were recalled from office and replaced by opponents of the proposal who were appointed by the remaining Commissioners. Pet. App. 10a-11a.

3. Based on these facts, the district court concluded and the court of appeals agreed that Baldwin House would have constructed low-income housing had it not been for the interference of the City, and that the City's interference was motivated, in part, by a desire to exclude blacks from Birmingham. The court found that the Commissioners' actions beginning in November 1977 were designed to appease racially motivated opponents of Baldwin House. Pet. App. 12a-13a. The court further concluded that, following the April 1978 election, at least two City Commissioners opposed Baldwin House because of their desire to exclude minority citizens from Birmingham. Thereafter, the contract for sale of the land was allowed to lapse. Pet. App. 16a.

Citing, inter alia, the following, the district court held that race was a significant motivating factor in the City's interference with Baldwin House: (1) public statements voiced by opponents of Baldwin House; (2) opinion testimony of supporters of Baldwin House describing the motivation of the opposition; (3) the unusual sequence of events leading to the contract amendments and the refusal to extend it; (4) the decision to invoke the extraordinary procedure of submitting the proposal to an advisory referendum; (5) the ouster from office of all Commissioners who supported Baldwin House; and (6) the virtually all white character of Birmingham (Pet. App. 11a-12a).

The district court concluded that the United States had established the City's discriminatory intent by showing that the City Commission acted for the purpose of effectuating the desires of private citizens, who were motivated in their opposition to the Baldwin House project in part by race and whose racial motivations were made known to the Commission members and were permitted to influence the Commission's decision (Pet. App. 13a).

4. The court of appeals affirmed the district court's findings of fact, rejecting petitioner's contention that they were based on inadmissible hearsay (Pet. App. 55a-56a). The court of appeals found it unnecessary to determine whether it was proper for the district court to examine the motivation of voters in the referendum, since the district court's finding of intentional racial discrimination was supported without reliance on the referendum (*id.* at 56a-57a). The court of appeals also affirmed the district court's holding that the City had acted with discriminatory intent and, finally, affirmed the remedy, with the modification requested by both the United States and petitioner (see page 2, *supra*).

ARGUMENT

Petitioner acknowledges (Pet. 18) that it is asking this Court to review findings of fact made by the district court and undisturbed by the court of appeals. Indeed, the City suggests (Pet. 21-23) that this Court disregard its well-established two-court rule (see *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967)) and re-evaluate the weight to be accorded to exhibits and to the live testimony of witnesses. There is, however, no occasion for the Court to abandon its well settled practice of not reviewing findings of fact concurred in by both courts below — findings that are in any event fully supported by the record. Since petitioner's remaining contentions also lack merit, further review is not warranted.

1. Petitioner argues (Pet. 8-12) that the finding that it acted with racially discriminatory intent is erroneous because the City offered nondiscriminatory grounds for its actions, which the United States failed to establish were pretextual. We note first that the City is asking this Court to review a finding of intentional discrimination in which both lower courts concurred. Moreover, the City's contention is

simply erroneous. The principal "non-discriminatory reason" offered by the City for its interference with the Baldwin House project was fear that low-income housing would lower property values (see, *e.g.*, Pet. 9). While the district court assumed (Pet. App. 19a) that "[a] city may well be within its rights to oppose low-income housing out of a desire to exclude all poor people," it nevertheless specifically found (*ibid.*):

> The evidence here establishes that a significant percentage of those who opposed Baldwin House out of fear that property values might decline, based their fears on the belief that an influx of black people into a community decreases property values.

See also *id.* at 7a.

A second significant "non-discriminatory reason" offered by the City was fear of outsiders (Pet. 9). The district court explicitly found the term outsiders, however, to be a code word for minorities (see, *e.g.*, Pet. App. 6a-7a). The City also contends (Pet. 9) that resentment of minority occupancy goals was a non-discriminatory basis for blocking the Baldwin House project. Again, however, the district court found that, in the circumstances of this case, the campaign against minority occupancy goals was part of an effort to block the Baldwin House proposal because it would increase the number of black people in Birmingham (Pet. App. 9a). The district court, therefore, directly addressed the most significant of the City's assertedly neutral justifications for its actions and found them to be either pretextual or unpersuasive. The court of appeals correctly found the district court's findings fully supported by the evidence. Moreover, the district court found that but for the actions of the City, which it found to be motivated by race, the Baldwin House project would have been built (Pet. App. 20a). The courts below thus concurred in findings, fully

supported by the evidence, that amply satisfy the requirements of *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 271 n.21 (1977). Petitioner's contention (Pet. 10-12) that the decision below creates a conflict in the circuits thus is unsupported and does not mask the fact that it is simply asking this Court to review a finding of fact.

2. Petitioner also contends (Pet. 12-16) that it was error for the district court to inquire into the motivation of voters who opposed Baldwin House in the April 1978 referendum. As the court of appeals stated, however, such inquiry was not essential to the finding of discriminatory motive (Pet. App. 56a-58a). Indeed, while the referendum was one factor among a totality of circumstances discussed by the district court (see page 4, *supra*), as the court of appeals noted (Pet. App. 57a), it was not identified "as one of the critical factors." Because the court of appeals based its affirmance solely on factors other than the motivation of the voters in the referendum, it found it unnecessary "to pass upon the issue of whether a district court may make a judicial examination of the motivation of voters in an advisory referendum election" (*ibid.*). The issue, therefore, is not properly presented for review by this Court.

3. Petitioner further suggests (Pet. 17) that it was insufficient for the district court to find that the City Commission blocked the Baldwin House proposal to appease citizens who were motivated by race. A finding, however, that governmental action was taken to effectuate the policies of racially motivated private citizens can be sufficient to establish discriminatory intent.[3] As this Court recently stated in

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[3]We note that the district court found that two members of the City Commission themselves were motivated by racial animus in their opposition to Baldwin House (see pages 3, 5, *supra*).

Palmore v. *Sidoti*, No. 82-1734 (Apr. 25, 1984), slip op. 4:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

The overwhelming evidence in this case that opponents of Baldwin House were motivated by racial prejudice and orchestrated a campaign against Baldwin House based on race and that the City Commission took a series of actions in direct response to this campaign fully supports a finding that the City's action was taken " 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979) (quoting *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 179 (1977) (concurring opinion) (footnote omitted)).

4. Finally, the City contends (Pet. 18-23) that the finding of discriminatory intent was based on weak evidence and, therefore, is clearly erroneous. As noted above (page 6, *supra*), petitioner is thus asking this Court to reevaluate the weight to be accorded live testimony and witnesses and, ultimately, to review and reject a finding of fact concurred in by two courts. Such an effort would be a misuse of this Court's limited resources. *United States* v. *Reliable Transfer Co., supra*; *Berenyi* v. *Immigration Director, supra*. In any event, the City's hearsay arguments are facially spurious and were properly rejected by the court of appeals.[4]

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[4]For example, petitioner contends (Pet. 19-20) that the flyers opposing the Baldwin House proposal upon which the district court relied (Pet. App. 9a-10a) were inadmissible because they were hearsay. As petitioner acknowledges (Pet. 19-20), however, the flyers were not introduced to show the truth of the statements they contained, but rather to demonstrate the motivation of a segment of Birmingham's population and to show that the Commission had knowledge of the racial attitudes exhibited by the flyers. Accordingly, the flyers were not hearsay. See Fed. R. Evid. 801(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX*

To assist courts in this inquiry, the Supreme Court has identified objective factors that may be probative of racially discriminatory intent: (1) the racial impact of an official action; (2) the historical background of the decision; (3) the sequence of events leading up to the challenged decision, including departures from normal procedures and usual substantive norms; and (4) the legislative or administrative history of the decision. *Arlington Heights, supra*, 429 U.S. at 266-267, 97 S. Ct. at 563-564. No single factor may be dispositive of this decision. In the present case we conclude that the district court did not err in deciding that the totality of circumstances establishes that the City of Birmingham blocked development of Baldwin House with racially discriminatory intent. The details of evidence supporting this conclusion are set forth in the opinion of the district court. 538 F. Supp. 819 *et seq.*

The United States and the City of Birmingham have agreed, both in their brief and in oral argument, that the district court exceeded its remedial authority by enjoining the City from engaging in "*any conduct*" that interferes with Baldwin House's efforts to construct low-income family and senior citizen housing within the City of Birmingham. The Government concedes that the injunction should be limited to prohibition of conduct *because of race*. The Government agrees that the City "should be left free to pursue legitimate interests, such as the enforcement of zoning ordinances and building codes, so long as their interests are not exercised with discriminatory motive."

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*See note 1, *supra*.

We agree with the Government's concession. Accordingly, it is ORDERED that the first paragraph of the judgment of the district court reported at 538 F. Supp. 831, be and hereby is amended by inserting after the words "from engaging in any conduct" the words "because of race or with discriminatory motive on account of race."